No. 18-1306

IN THE

Supreme Court of the United States

FRED ANDERSON, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

BRIEF OF *AMICI CURIAE* RETIRED FLORIDA JUDGES AND JURISTS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTERESTS OF AMICI CURIAE[1]

The issue before the Court is the constitutionality of the Florida Supreme Court's conclusion that a unanimous advisory jury vote renders a judge-imposed death sentence harmless. Amici are retired judges and jurists who have served at various levels of the Florida judicial system. They include trial judges who have presided over capital cases and Justices of the Florida Supreme Court. Collectively, they have spent well over a century in public service, devoting time, effort, and in some instances their entire careers to the pursuit of justice in Florida's judicial system. They, therefore, have particular interest and expertise in the legal and practical ramifications of the Florida Supreme Court's treatment of judge-imposed death sentences following a unanimous advisory jury vote.

Former Justice Rosemary Barkett served on the Florida Supreme Court between 1985 and 1994, during which time she held the position of Chief Justice from 1992 to 1994. Justice Barkett served on the United States Court of Appeals for the Eleventh Circuit between 1994 and 2013. She presently serves on the Iran-United States Claims Tribunal, The Hague. Before taking the Florida Supreme Court bench, Justice Barkett served in Florida's Fifteenth Judicial Circuit from 1979 to 1984, and as a judge in the Fourth District Court of Appeal between 1984 and 1985.

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[1] Pursuant to Supreme Court Rules 37.2(a), 37.3(a) and 37.6, Amici Curiae certify that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, Counsel of Record for all parties received timely notice of amici curiae's intention to file this brief, and that the parties have consented to the filing of this brief.

Former Justice Gerald Kogan served on the Florida Supreme Court from 1987 to 1998. Justice Kogan previously served as chief prosecutor of Miami-Dade County, Florida's Homicide and Capital Crimes Division and as a circuit judge in Florida's Eleventh Judicial Circuit.

Former Justice James E.C. Perry served on the Florida Supreme Court from 2009 to 2016 and served as both a circuit judge and Chief Judge in Florida's Eighteenth Judicial Circuit prior to his elevation. Justice Perry previously was in private practice at the law firm of Perry & Hicks, P.A., specializing in civil and business law.

Former Justice Harry Lee Anstead served on the Florida Supreme Court from 1994 to 2009. Justice Anstead previously had served as a trial and appellate lawyer until 1977, when he became a judge in Fourth District Court of Appeal.

Former Judge O.H. Eaton, Jr., served in Florida's Eighteenth Judicial Circuit from 1986 to 2010. Judge Eaton previously served as a captain in the U.S. Army in Vietnam and a prosecutor in Seminole County, Florida. He is considered a death penalty expert and has taught judges across the country how to handle capital cases.

Former Judge Laura Melvin served in Florida's First Judicial Circuit from 1990 until 2000, during which time she presided over capital trials. Judge Melvin previously served as an Assistant State Attorney in the First Judicial Circuit and an Assistant Public Defender in the Fifth Judicial Circuit.

SUMMARY OF ARGUMENT

Petitioner, Fred Anderson, was sentenced to die pursuant to a capital sentencing scheme this Court has struck down as unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016). Yet, in defiance of the Court's decision in *Hurst*, the Florida Supreme Court has refused to order resentencing for petitioner, applying a *per se* rule that also affects 33 similarly situated defendants. The Florida Supreme Court's decisions disregard the jury's constitutional responsibility to make the grave decision to sentence a person to death. *Hurst* held that the Constitution requires the jury to make the critical factual findings necessary to impose the death penalty. *Id*. at 622. This Court in *Hurst* admonished that an advisory jury recommendation to impose a death sentence is a "constitutional non-entity," the equivalent of "no jury findings" at all. *Id.* (citation omitted) As a result, the Court held that Florida's death-penalty scheme, which relegated the jury to an advisory role divorced of a critical fact-finding mission, violated the Sixth Amendment. See *id*.

The Florida Supreme Court has failed to implement *Hurst*'s holding by denying resentencing to defendants like Fred Anderson, who were sentenced to death by a judge rather than a jury, so long as the jury's advisory death recommendation was unanimous. The per curiam opinion of the Florida Supreme Court perpetuated its *per se* rule that any advisory recommendation for the death penalty is automatically harmless if the jury's recommendation was unanimous. See Pet. App. 2a (stating that the court has "consistently . . . den[ied] *Hurst* relief to defendants who have received a unanimous jury recommendation of death"). That *per se* rule is deeply flawed. The Florida Supreme

Court's *per se* harmlessness rule fails to heed *Hurst*'s core holding that death sentences imposed under an advisory jury regime are constitutionally defective.

The court's approach also is irreconcilable with *Caldwell v. Mississippi*, 472 U.S. 330 (1985) where this Court held it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id*. at 328-29. Where a jury is not informed that it is the final arbiter of life and death, this Court has determined that the result is inherently unreliable and therefore violative of the Eighth Amendment's protections against cruel and unusual punishment. *Id.* at 330. Similarly, in *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), this Court held that the failure to instruct the jury on the beyond-a-reasonable-doubt standard was so inimical to the Sixth Amendment's guarantee of the right to a jury trial, that it "vitiate[d] *all* the jury's findings." *Id.* at 281. Under those landmark precedents, a death sentence imposed with only an advisory jury recommendation requires reversal of the death sentence, not a *per se* affirmance.

Even under harmless error review, the Florida Supreme Court's *per se* rule is improper. Under the familiar harmless error review established by this Court in *Chapman v. California,* a court must make a fact-specific determination whether the error was proven harmless beyond a reasonable doubt. 386 U.S. 18 (1967). A court, at minimum, must actually evaluate whether a jury may have viewed both the proceeding and its own duties through an entirely different lens and potentially reached a different result if it had been required to make the critical

factual findings unanimously and had it been properly instructed on its role as the final decision-maker. Unless no reasonable doubt exists about that outcome, the death sentence must be reversed.

The jurors that recommended a death sentence for petitioner were not instructed that his life lay in their hands. They did not make factual findings regarding the presence of aggravating and mitigating factors. Nor did the juries who sentenced 33 other inmates currently on Florida's death row make those constitutionally-mandated decisions.

The consequences of these grave constitutional errors are too severe to leave their challenges unanswered. Since *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), this Court has repeatedly reaffirmed that "death is different," "unique in its severity and irrevocab[le]," and must not be "inflicted in an arbitrary and capricious manner." *Gregg* v. *Georgia*, 428 U.S. 153, 187-88 (1976); see also *Kennedy* v. *Louisiana*, 554 U.S. 407, 436 (2008) (citing *California* v. *Brown*, 479 U.S. 538, 541 (1987) ("[D]eath penalty statutes [must] be structured so as to prevent the penalty from being administered in an arbitrary and unpredictable fashion.")). Nor should death be meted out in a system lacking constitutional reliability. See *Woodson* v. *North Carolina*, 428 U.S. 280 (1976); see also *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (there is a "qualitative difference between death and other penalties" requiring "a greater degree of reliability when the death sentence is imposed").

The Florida Supreme Court's harmless error approach is inconsistent with this Court's precedents and taints the sanctity of the jury's role as the community's conscience. It deprives not only petitioner but 33

other similarly-situated death row inmates of the fundamental protections of the Sixth and Eighth Amendments. There is nothing harmless about such error. The petition for a writ of certiorari should accordingly be granted.

ARGUMENT

THE COURT SHOULD GRANT REVIEW OF THIS CAPITAL CASE TO ADDRESS THE FEDERAL CONSTITUTIONAL ARGUMENTS THAT THE FLORIDA SUPREME COURT HAS REPEATEDLY IGNORED.

A. The Florida Supreme Court's Decision Conflicts With *Hurst* and *Caldwell* and Unjustly Denies Petitioner and Other Similarly Situated Defendants a Constitutional Capital Sentencing Process

At the heart of this Court's Eighth Amendment jurisprudence lies the assumption that those charged with the weighty task of capital sentencing would view their duty as the serious one of determining whether a "human being should die at the hands of the State." *Caldwell* v. *Mississippi*, 472 U.S. 320, 329 (1985); see also *Ring* v. *Arizona*, 536 U.S. 584 (2002). As a result, "the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." *Ring*, 536 U.S. at 618 (Breyer, J., concurring in the judgment). A sentencer's understanding of this "awesome responsibility" in making a sentencing decision is therefore indispensable to the Eight Amendment's protection against cruel and unusual punishment. *Caldwell,* 472 U.S. at 341. The principles articulated in *Caldwell* reflect the Court's conception of capital punishment in the context of the Eighth Amendment, as not only prohibiting

punishments which "involve the unnecessary and wanton infliction of pain," (*Gregg,* 428 U.S. at 173), but also requiring that the process by which the sentence is imposed is free from arbitrariness and caprice. *Id*. at 195, 198.

In *Caldwell*, the penalty phase jury did not receive an accurate description of its role in the sentencing process because the State suggested that the jury's decision to impose the death penalty would not be final, but instead would be subject to appellate court review. 472 U.S. at 328-29. This Court found that those remarks "led [the jury] to believe that the responsibility for determining the appropriateness of the defendant's death [sentence] rests elsewhere." *Id.* at 329. This Court concluded that, because the State's remarks may have affected the jury's sentencing decision, the capital sentence failed to satisfy the Eighth Amendment's standards of reliability. *Id.* at 341.

This Court in *Caldwell* recognized "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *Id.* at 329 (quoting *California* v. *Ramos*, 463 U.S. 992, 998-99 (1983)). Accordingly, "many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion." *Id*. (citing *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982); *Lockett* v. *Ohio*, 438 U.S. 586 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U.S. 349 (1977) (plurality opinion); *Woodson* v. *North Carolina*, 428 U.S. 280 (1976)).

Caldwell and *Hurst* v. *Florida*, 136 S. Ct. 616 (2016), established a clear constitutional mandate that a death sentence may only be imposed by a properly

instructed jury, not a judge. Yet, the Florida Supreme Court has persisted in rejecting claims by capital defendants whose sentences were imposed in plain violation of *Hurst* and *Caldwell*. Beginning with *Pope* v. *Wainwright*, 496 So. 2d 798 (Fla. 1986), the Florida Supreme Court refused to apply *Caldwell* on the theory that Florida's instructions accurately described the jury's "merely" advisory nature, whereas in *Caldwell*, the jury was told incorrectly that its role was only advisory under the applicable state law. *Id*. at 805. The Florida Supreme Court found "nothing erroneous about informing the jury of the limits of its sentencing responsibility," so as to "relieve some of the anxiety felt by jurors impaneled in a first-degree murder trial." *Id.* The Florida Supreme Court reaffirmed that erroneous view in *Combs* v. *Florida*, 525 So. 2d 853, 856 (Fla. 1998). But those decisions misread *Caldwell*, which held, in no uncertain terms, that advisory jury instructions violate the Eighth Amendment.

This Court has intervened multiple times to correct the Florida Supreme Court's refusal to adhere to the constitutional requirements for capital sentencing. See pp. 15-17, *infra.* In *Hurst*, this Court struck down Florida's capital sentencing scheme as unconstitutional, precisely because juries did not fulfill their constitutionally mandated role as fact-finders. *Hurst* made clear that the jury is required to find each element necessary to impose a death sentence, and to weigh the aggravating and mitigating circumstances. And *Hurst* went further, observing that a jury that makes death sentencing recommendations under an advisory regime—like Florida's prior system—is a constitutional non-entity, the Court held, the equivalent of "no jury findings." 136 S. Ct. at 622.

The jury in petitioner's case utilized the unconstitutional advisory process invalidated in *Hurst*. No evidence exists that the jury made any of the requisite findings of fact that could support a constitutional death sentence. Replicating the practice followed in essentially all of Florida's pre-*Hurst* cases, the jurors in petitioner's case were repeatedly told that their recommendation was advisory and that the final sentencing decision rested solely with the judge.[2] Petitioner's jurors recommended death having been informed "that the responsibility for determining the appropriateness of the defendant's death sentence lies elsewhere." *Caldwell*, 472 U.S. at 328-29.

Here, the trial judge informed the jury of its diminished advisory role. That the judge himself emphasized the jury's mere advisory status makes this an even clearer Eighth Amendment violation than in *Caldwell*, where the prosecutor told the jury in his closing arguments that it played only an advisory role. Arguments by prosecutors are "likely to be viewed as the statements of advocates," whereas jury instructions are likely "viewed as definitive and binding statements of the law." *Boyde* v. *California*, 494 U.S.

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[2] In fact, as the following excerpts from the proceedings below suggest, the trial court and the State regarded the jury's role as minimal in importance – focusing on the potential impact of a drawn out penalty phase on one juror's pre-arranged vacation plans instead of on petitioner's constitutional rights.

State: I am just concerned about the consumption of time because of Miss Gleason's plane ticket, if there is any way – it occurred to me last night that only [sic] has she sunk money into a plane ticket, but if she is going to a class reunion, she has sunk money into that as well. Tr. 2305:6-13.

State: [W]e need to advise Miss Gleason to drive very carefully. We have a note which hopefully will cover her in case she misses her flight." Tr. 2671:8-13.

370, 384 (1990). As this Court has recognized, "[t]he influence of the trial judge on the jury is necessarily and properly of great weight, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946) (citations omitted).

Stripped of the heavy burden of being the final arbiter of life and death, the jurors in this case recommended that petitioner be sentenced to death. The advisory sentence taints the sanctity of the jury's role as fact-finder in our criminal justice system and as the final arbiter of capital sentencing. *Hurst* and *Caldwell* have made clear that an advisory jury recommendation for a death sentence is a nullity and cannot constitutionally serve as the basis for capital punishment.

B. The Florida Supreme Court's *Per Se* Harmless Error Rule Violates the Eighth Amendment and This Court's Precedents

In ongoing defiance of this Court's mandates, the Florida Supreme Court continues to deny resentencing to defendants who, like petitioner, were sentenced to death by a judge rather than a jury, whenever the jury unanimously gave an advisory recommendation to impose the death penalty. Florida has followed the same mechanical approach in every single capital case where the pre-*Hurst* advisory jury's recommendation was unanimous, concluding only on the basis of the jury's unanimity that any *Hurst* error was harmless.

The well-established "harmless error" standard requires the government to prove "beyond a reasonable doubt" that the error complained of did not contribute to the verdict. See, *e.g.*, *Chapman* v.

California, 386 U.S. 18 (1967). Here, the Florida Supreme Court conducted no meaningful harmless error analysis at all. Rather, with minimal analysis, the Florida Supreme Court simply applied a *per se* rule that any *Hurst* error was harmless because the jury provided a unanimous advisory recommendation for the death penalty. Pet. App. 3a. But unanimity cannot serve as a legally-dispositive proxy for individual fact-finding demonstrating that an error was harmless. If that were true, no unanimous criminal verdict could be dislodged due to constitutional error. *Chapman* obviously refutes that notion. The Court should end this erroneous practice once and for all.

Here, a unanimous recommendation is still advisory, and therein lies the problem. A vote of a pre-*Hurst* advisory jury cannot be dispositive. Consistent with the principles of *Caldwell*, no court can be certain beyond a reasonable doubt that, absent *Hurst* error, a jury would have recommended death. It is far from predetermined that a jury who grasped its critical role as an arbiter of life and death would have found all the elements justifying imposition of the death penalty to be satisfied. Indeed, a jury properly instructed on its role may have viewed the proceedings and its own duties through an entirely different lens.

Even if the jury had made all the necessary factual findings to support imposition of a death sentence—a fact unknowable from a final vote alone—the same sentence would not necessarily have followed. The jury may have differed on the weight to be given to aggravating and mitigating circumstances. Or, if instructed on their proper role as the final decision-maker, the jury may have opted for a life sentence. That is why this Court has held that advisory jury verdicts are inherently unreliable. See *Woodson*, 428

U.S. at 305 ("[T]here is a . . . need for reliability in the determination that death is the appropriate punishment *in a specific case*." (emphasis added)). The absence of reliability, in turn, infects the capital sentencing system with an arbitrariness that is fundamentally at odds with constitutional protections. See *Godfrey* v. *Georgia*, 446 U.S. 420, 428 (1980) ("[I]f a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids arbitrary and capricious infliction of the death penalty.").

Empirical research refutes the Florida Supreme Court's assumption that unanimity is a proxy for harmlessness. Rather, a jury's analysis and description of their duties is deeply affected by the responsibility they bear for the ultimate sentence. See, *e.g.*, Am. Bar Assoc., *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* vii n.24 (Sept. 2006) (ABA Report)[3] (citing William J. Bowers et al., *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and Jury Influence Death Penalty Decision-Making,* 63 Wash. & Lee L. Rev. 931, 954-62 (2006)). Interviews with Florida jurors conducted through the Capital Jury Project ("CJP") yielded narrative accounts that highlight how Florida's pre-*Hurst* advisory jury system diminished the jurors' view of their role in the capital sentencing process. See *Bowers*, 63 Wash. & Lee L. Rev. at 961-62. Florida jurors relayed to researchers their understanding that "[w]e don't really make the final decision . . . we would give our opinion but the choice would be up to the judge." *Id.* at 961. One Florida juror told CJP

[3] *See* https://bit.ly/2vS5Mu7.

researchers that "the fact that you could make a recommendation, that you didn't make a yes or no, that someone else would make the decision, I think that let us feel off the hook." *Id*. The same juror noted that he found the pre-*Hurst* sentencing process to be "not as traumatic as deciding [the defendant's] guilt because we would take the steps, make a recommendation, and the judge would make the final choice." *Id*. As another Florida juror said of Florida's pre-*Hurst* advisory jury instructions, "I didn't want this on my conscience." *Id.*[4]

Perhaps most emblematic of the issue is the Florida Supreme Court's own acknowledgement through its 2009 amendment of the capital penalty-phase instructions. See *In re Standard Jury Instructions in Criminal Cases—Report No. 2005-2*, 22 So. 3d 17 (Fla. 2009) (per curiam). The court recognized that Florida's capital penalty-phase jury instructions caused substantial confusion for juries necessitating revised instructions addressed at "minimiz[ing] the likelihood of confusion concerning the jury's critical role in Florida's capital sentencing scheme." *Id.* at 19. The court believed it could remedy jury confusion through "re-ordering of

[4] In addition, the ABA Report underscored the extent of juror confusion in relation to capital sentencing recommendations. See ABA Report 304 ("[A]lthough the standard jury instructions clearly state that unlike aggravating circumstances, mitigating circumstances need not be proven beyond a reasonable doubt, and if the jury is reasonably convinced of the existence of a mitigating circumstance, they may consider it established, 48.7 percent of interviewed Florida capital jurors believed that the defense had to prove mitigation factors beyond a reasonable doubt." (footnote omitted)); see also *id.* at 304-305 (noting that "[a]pproximately 36% of interviewed Florida capital jurors believed that they were required to sentence the defendant to death if they found the defendant's conduct to be 'heinous, vile, or depraved' beyond a reasonable doubt").

the[] instructions," adding definitions, and amending explanatory language. *Id.* at 22. This modification, however, did not address the more fundamental issue: the absence of constitutionally-required, specific findings of fact on aggravating circumstances, and the weighing of mitigating circumstances. Without that critical information, a reviewing court cannot meaningfully rely on an advisory recommendation, irrespective of whether it is unanimous. As Justice Pariente stated, a sentencing recommendation from a confused jury is akin to "fishing in the dark." *Id.* (quoting *LeBron* v. *Florida*, 982 So. 2d 649, 671 (Fla. 2008) (Pariente, J., concurring)).

Reliance by the Florida Supreme Court on the unanimous advisory verdict to deem the constitutional error here harmless is the very problem that concerns amici. The bare verdict form used over petitioner's objection, reveals no constitutionally-required fact-finding whatsoever, and therefore could not reasonably have formed the basis of a constitutional death sentence. Tr. 2327-28. The court's mechanical reliance on unanimity is fundamentally misplaced.

C. The Florida Supreme Court's *Per Se* Rule Is at Odds with *Sullivan* v. *Louisiana*

The grave Eighth Amendment concerns implicated by the Florida Supreme Court's *per se* rule were the subject of previous sections. That is not the end of the inquiry, however, as the rule also presents significant Sixth Amendment concerns.

In *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993), this Court unanimously held, in an opinion by Justice Scalia, that even though the jury had rendered a decision on each element of the offense, the trial court's improper instruction on the beyond-a-reasonable-doubt standard

"vitiate[d] *all* the jury's findings." *Id.* at 281. This defect meant that, for purposes of harmless-error review, "there has been no jury verdict within the meaning of the Sixth Amendment." *Id.* at 280.

Under *Sullivan*, an advisory jury recommendation is not a verdict under the Sixth Amendment because the jury did not find *any* of the requisite facts needed to support a death sentence. Florida's advisory juries also were given a defective instruction, which vitiated each element for a constitutional death sentence under state law. As in *Sullivan*, without a constitutionally cognizable jury verdict, "the entire premise of *Chapman* review is simply absent." *Id.* Under *Sullivan*, an advisory jury recommendation is a nullity for purposes of the Sixth Amendment.

The Florida Supreme Court's *per se* harmless error rule cannot be reconciled with this principle, as the death sentence here was based entirely on an unconstitutional vote of an advisory jury. Accordingly, as in *Sullivan*, petitioner's death sentence is substantively infirm, and not merely the byproduct of a procedural error.

D. To Avoid Repeating the Injustices of the Past, the Questions Presented by the Petition Should Be Decided Sooner Rather Than Later

The petition's constitutional arguments are both compelling and urgent. Amici are concerned that the failure to grant relief now will further compound the same widespread, irreparable injustices that many of

them have lived through during their recent decades on the Florida bench.[5]

Florida's past history demonstrates that its capital jurisprudence has remained at odds with this Court's precedents, and that the Florida Supreme Court has repeatedly held fast to unconstitutional procedures, affirmed unconstitutional death sentences, and ultimately executed individuals convicted and sentenced under unconstitutional past regimes, before this Court intervened. In multiple instances, it was only through this Court's intervention that the Florida Supreme Court adopted capital sentencing reforms that complied with constitutional requirements. It took nine years for the Florida Supreme Court to heed the Court's decision in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), dictating that mitigating circumstances could not be confined to a statutory list. The Florida Supreme Court continued to apply its bright-line rule barring relief in cases where the jury was not instructed it

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[5] As former Florida Supreme Court Chief Justice Anstead observed in *Bottoson* v. *Moore*, 833 So. 2d 693 (2002) (per curiam), "the plurality opinion has chosen to retreat to the 'safe harbor' of prior United States Supreme Court decisions upholding Florida's death penalty scheme. That may well be the 'safe' option since it will require the Supreme Court to act affirmatively to explain its prior holdings in light of *Apprendi* [v. *New Jersey*, 530 U.S. 466 (2000)] and *Ring*. However, when one examines the holdings of *Ring* and *Apprendi* and applies them in a straightforward manner to a Florida scheme that requires findings of fact by a judge and not a jury, it is apparent that the harbor may not be all that safe."); see also *Duest* v. *Florida*, 855 So. 2d 33, 57 (Fla. 2003) (per curiam) ("I continue to view *Ring* as the most significant death penalty decision from the U.S. Supreme Court in the past thirty years and believe we, like the Arizona Supreme Court, are honor bound to apply *Ring*'s interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." (Anstead, C.J., concurring in part and dissenting in part)).

could consider non-statutory mitigating evidence until this Court mandated otherwise. See *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987) (Justice Scalia writing for unanimous Court); see also 2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* 2073 n.50 (6th ed. 2011) (estimating that 13 inmates who had presented the issue to this Court were executed before *certiorari* was granted). It took 12 years before the Florida Supreme Court was stopped from using its unconstitutional bright-line IQ score test to deny *Atkins* claims (*Atkins* v. *Virginia*, 536 U.S. 304 (2002)) even though this Court affirmatively ruled that the Eighth Amendment prohibits execution of the intellectually disabled. See *Hall* v. *Florida*, 572 U.S. 701 (2014). And, of course, the present situation arises because *Hurst* again struck down Florida's capital sentencing regime 14 years after this Court held in *Ring*, that a jury—not a judge—must conduct the fact-finding underlying a death sentence. See *Hurst*, 136 S. Ct. 616.

In the nearly decade and a half between *Ring* and *Hurst*, the Florida Supreme Court repeatedly rejected *Ring* claims. By the time *Hurst* was decided, hundreds of inmates—alive and dead—had been subjected to the unconstitutional procedure. In fact, during the long delay between *Ring* and *Hurst*, Florida has executed 41 individuals under an unconstitutional statutory scheme, nearly half of the total number of individuals executed by the State since 1976.[6] Applying its *per se* harmless error analysis to unconstitutional sentences, the Florida Supreme Court risks further expanding the class of individuals who will be executed based on constitutionally infirm sentences. Where death is

[6] Death Penalty Info. Ctr., *Execution Database*, https://bit.ly/2Q0Ce6G (last visited May 12, 2019).

concerned, this Court should not condone the Florida Supreme Court's refusal to remedy its unconstitutional status quo. *Hurst*'s and *Caldwell*'s dictates should be followed without further delay.

CONCLUSION

Amici therefore ask this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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